No. 87-1685

In the Supreme Court of the United States

October Term, 1987

SHELL OIL CO.,

Petitioner,

v.

CITY OF SANTA MONICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE CITIES OF TORRANCE, LONG BEACH AND CARSON IN SUPPORT OF RESPONDENT

STANLEY E. REMELMEYER
City Attorney of Torrance
JOHN R. CALHOUN
City Attorney of Long Beach
GLENN R. WATSON
City Attorney of Carson
RICHARDS, WATSON & GERSHON
MARSHA JONES MOUTRIE*
333 South Hope Street
Thirty-eighth Floor
Los Angeles, California 90017
Telephone: (213) 626-8484
Attorneys for Amici

* Counsel of Record

Westside Law Publishers Los Angeles, California (213) 477-0491

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INTEREST OF AMICI

The California cities of Torrance, Long Beach and Carson submit this brief pursuant to Supreme Court Rule 36.4 as amici curiae in support of respondent. Each amicus is an urban, California city located in Los Angeles County. Each does business with private, interstate companies, including pipeline operators.

I.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because the decision rendered by the Ninth Circuit Court of Appeals is both firmly grounded in precedent and narrowly worded. Contrary to the assertions of petitioner

and its amici, the Ninth Circuit's decision will not force private pipeline companies to pay exorbitant sums to cities for land leases. Such companies have various alternatives available to them, and their interests are amply protected by state statutes.

Petitioner advocates a constitutional reinterpretation which would radically expand the sweep of the dormant Commerce Clause by reading into it a judicially-created right on the part of private businesses to utilize government land for a nominal fee. Petitioner's novel theory would restrict the ability of state and local governments to participate in the marketplace and would move negotiations between public entities and private businesses from the bargaining table into the courts. The Ninth Circuit's decision and the facts of this case do not warrant such a departure from precedent.

If the Court nevertheless grants the petition filed by Shell Oil Company, then the Court should also grant the City of Santa Monica's cross-petition so that the Court can clarify the application of the market participant doctrine and reaffirm the sound policies which it effectuates.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S NARROW DECISION COMPORTS WITH ESTABLISHED PRECEDENT AND DOES NOT WARRANT THE RADICAL EXPANSION OF THE DORMANT COMMERCE CLAUSE SOUGHT BY PETITIONER

A. The Ninth Circuit's Holding Is Firmly Grounded In Precedent And Narrowly Limited In Its Application

The Ninth Circuit's holding comports with the guidelines this Court has established for determining whether a user fee or a general revenue tax violates the dormant Commerce Clause. Under those guidelines, a user fee must not discriminate against interstate commerce and must bear a reasonable relationship to the services rendered. *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. ___, 107 S.Ct. 2829 (1987); *Evansville-Vanderberg Airport Authority Dist. v. Delta Airlines, Inc.,* 405 U.S. 707 (1972). Applying that two-pronged test, the Ninth Circuit Court of Appeals upheld Santa Monica's proposed charge as a valid user fee. App. A-15. The court explained that the charge was based on a formula which did not discriminate between intra and interstate commerce and that the charge, which was based upon abutting land value, related reasonably to the benefit conferred by the city—the exclusive use of land. *Id.*[1]

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[1] Shell asserts that a charge based upon abutting land value does not reflect the value of the land which will actually be used and therefore unconstitutional. Cert. Pet. at 15. Shell mistates the issue. As the Ninth Circuit correctly assumed, the question is whether the proposed charge reasonably relates to the value of the use—

A general revenue tax must be reasonably related to the extent of the taxpayer's contact with the taxing jurisdiction. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). In this case, Santa Monica's proposed charge for exclusive use of land is directly linked to land value and the amount of land being leased. Thus, whether analyzed as a fee or a tax, the proposed charge fulfills the requirements of the Commerce Clause; and was therefore properly upheld by the Ninth Circuit.

While basing its decision squarely upon established precedent, the Ninth Circuit chose to word its holding narrowly:

> "[W]e are unable to conclude that this valuation is 'manifestly disproportionate to the services rendered.' . . . We conclude that Shell has not met its burden at summary judgment of showing that Santa Monica has discriminated against interstate commerce. Accordingly, we affirm. . . ." App. A-15.

Because the Ninth Circuit correctly applied the standards established by the Court, this case involves no error of law which would necessitate review. Moreover, because the Ninth Circuit fashioned a narrow holding, its decision requires neither clarification nor limitation.

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not whether the two are equivalent. The Commerce Clause requires only a "fair, if imperfect, approximation of the use. . . ." *Evansville-Vanderberg Airport Authority*, 405 U.S. at 717. It does not dictate the amount of the charge. *Id.* at 712-713.

B. The Petition Should Be Denied Because It Advocates A Radical And Unprecedented Expansion Of The Constraints Imposed By The Dormant Commerce Clause Which Would Fundamentally Alter Relationships Between Interstate Companies And State And Local Governments.

The conduct of the parties in this case conforms with normal business practices. Santa Monica negotiated for full value for the exclusive use of the land beneath its streets. The fee it proposed reflects current economic realities, including the value of land in Santa Monica, the city's possible liability in the event of a pipeline rupture in the 40-year old pipeline, recent trends in franchising, and the city's need to generate revenue. See section II.C., *infra*. Petitioner sought the lowest possible charge in order to transport its crude as cheaply as possible. This is standard business conduct. What is not standard in this case is the radical departure that petitioner asks this court to make from precedent.

Petitioner would have this Court read into the constitution a judicially-created right on the part of private companies to the exclusive use of government property for a nominal fee. This expansion of the dormant Commerce Clause would effectively deprive states and cities of their recognized right to determine with whom they will deal. *See Reeves, Inc. v. Stake*, 447 U.S. at 438-439, *citing Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases") and *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (referring to the longstanding right of those in

private business to exercise their independent discretion as to parties with whom they will deal). It would also restrict cities' Tenth Amendment right to control the disposition of their sovereign property in general and of their streets in particular. *See* E. McQuillan, *Law of Municipal Corporations,* Vol.10, p.763 (3d ed. 1981) (explaining that a city controls street usage and may forbid private use).

Shell would also have this court confer upon private pipeline companies the benefits of public utility status. The Ninth Circuit rejected this "discrimination" argument out of hand. App. A-12, n.7. This Court should do the same for the reasons specified by the Ninth Circuit: the public utilities in Santa Monica benefit the city's residents while Shell does not, and oil pipelines may present different hazards than utility lines and could therefore expose the city to greater liability. *Id.* Additionally, this Court should refuse to accord the benefits of utility status to petitioner because petitioner is not subject to the regulatory burdens which restrict the activities and profits of utilities. It is understandable that petitioner seeks the benefits without the burdens, but there is no precedent for interpreting the dormant Commerce Clause to accord such preferential treatment to interstate companies. Like other businesses, they must pay their own way. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1937).

Finally, petitioner claims an entitlement to a full trial on the issue of land value. This request raises the spectre of lengthy court trials, akin to antitrust or eminent domain proceedings, every time a city and a private interstate company are unable to agree upon contract terms. It is one thing for the federal courts to function as they have in this case, providing facial review to ensure

that proposed contract terms comport, as a matter of law, with constitutional standards. It is quite another thing for the courts to be put in the position of determining contract terms. Shell's claim that it must receive a trial on the issue of land value presages an unwarranted intrusion of the judiciary into the commercial conduct of cities and a substantial increase in the workload of the federal trial courts.

C. The Petition Should Be Denied Because It Advocates Judicially-Imposed Limitations Upon The Bargaining Process Which Would Preclude Cities From Negotiating On The Basis Of Current Economic Realities

Petitioner seeks to establish a constitutional right to a new lease on virtually the same terms as its expired lease which was granted forty-seven years ago, in 1941. The former lease simply does not reflect the realities of today's, rapidly-changing marketplace. Today, land values in urban Southern California are among the highest in the nation, and they continue to escalate. Today, cities may be held liable if pipelines beneath their streets rupture and cause injury or damage. *See, e.g., McMahan's of Santa Monica v. City of Santa Monica,* 146 Cal.App.3d 683 (1983) (holding that city was liable on inverse condemnation theory for damage to retailer suffered as a result of a ruptured water main).

Changes such as these have caused cities and other entities to re-examine and revise their practices in leasing land to pipeline operators:

> "The idea in the early days that franchises were of little value has changed, largely because of the phenomenal growth of American cities, so that now, instead of giving away franchises

> without consideration, the tendency is to protect fully the interests of the municipality, both for the present and the future, and to preserve the right to regulate the operations of the grantee of the franchise, for the protection of the municipality and its inhabitants against the possible greed of the grantee, arising from its having a monopoly." McQuillin, *supra*, Vol. 12, p.8.

Higher charges have been the inevitable result. The annual charge of between 1/2 cent and 2 cents per diameter inch per lineal foot, which petitioner's amici tout as "typical", does not reflect current economic realitites. Nor does it reflect the value of subsurface land in urban Southern California to private pipeline operators.[2]

That petitioner should seek a new lease on the advantageous terms which were acceptable to the City of Santa Monica in 1941 is understandable. That it should claim a constitutional right to these terms is not. The Commerce Clause, as consistently interpreted by this Court, does not insulate Shell from the changing conditions of the marketplace. *See Commonwealth Edison Corp. v. Montana*, 453 U.S. 609, 646 (1981) (the Commerce Clause does not secure special benefits to those engaged in interstate commerce).

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[2] For example, in 1984, appearing before the California State Board of Equalization, a real estate appraiser specializing in appraisal of pipeline easements, and appearing on behalf of oil companies, testified that amicus Mobil Oil Corporation had paid annual rates equivalent to $60.52 per lineal foot to Southern Pacific Railroad in order to obtain rights of way in amicus City of Long Beach. This rate, if applied by Santa Monica, would result in a proposed annual charge more than five times higher than the charge actually proposed by the city in this case.

D. Petitioner And Its Amici Have Exaggerated The Likely Impact Of The Ninth Circuit Court Of Appeals' Decision By Ignoring Both The Available Alternatives And The Safeguards Created By State Law.

Shell and its amici suggest that, unless this Court grants review, other cities will follow Santa Monica's lead by substantially increasing amounts charged for the use of land controlled by the cities and that such increases[1] will have dire consequences for the oil industry.[3] In fact, petitioner's prediction significantly exaggerates the probable consequences of the Ninth Circuit Court of Appeals' decision. As petitioner concedes, it has various alternatives for transporting crude oil. App. A-10, B-4-5. Thus, if dealing with a particular city becomes too expensive, a pipeline company can simply take its business to nearby cities with less expensive land. If dealing with cities in general becomes too expensive, the company can negotiate for easements with private landowners. If pipeline easements becomes too expensive, the company can transport its crude oil by truck or tanker.

Amici suggest that these alternatives are illusory or impractical and assert that, in urban areas, pipeline companies have no alternative but to pay the rents charged by cities. This suggestion distorts by omission because it fails to take into account the safeguards established by state law. The California Public Utilities Code confers the power of eminent domain upon all

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[1] As noted above, some cities and other entities have already begun to increase the amounts they charge to pipeline operators for leases, but that development reflects present economic considerations rather than judicial decisions.

utilities, including common carrier pipelines. *See* Cal. Pub. Util. Code section 610. Therefore, private pipeline operators need not engage in contractual negotiations with cities for the lease of land at all. Instead, as a matter of state law, they can simply choose to move their crude oil through common carrier pipelines, utilizing the power of condemnation to acquire the necessary land.

Moreover, as amici for petitioner acknowledge, the California Public Utilities Code affords additional protection to pipeline operators by setting the rate that general law cities may charge as pipeline franchise fees. *See* Cal. Pub. Util. Code section 6231 (establishing that the annual rate for nonpublic utility crude oil and product pipelines is 1/2 cent per inch per foot unless some other amount is agreed upon.) Thus, only the minority of California cities that have adopted their own city charters have the legal authority to engage in the kind of negotiation which occurred in this case; and those charter cities cannot renegotiate lease terms with pipeline companies until their current contracts expire.[4]

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[4] In 1985, petitioner had the franchise agreements with approximately twenty-eight California cities. Of those, only ten cities, including amicus City of Torrance, had adopted city charters, the remainder were general law cities, like amicus City of Carson.

III.

IF REVIEW IS GRANTED, THE COURT SHOULD ADDRESS THE ISSUE OF WHETHER THE MARKET PARTICIPANT DOCTRINE CONTINUES TO PROTECT A CITY'S RIGHT TO FREELY NEGOTIATE LEASES AND OTHER CONTRACTS WITH A PRIVATE COMPANIES ENGAGED IN INTER-STATE COMMERCE

Amici oppose the petition for a writ of certiorari. However, if review is granted, amici support Santa Monica's request that the Court address the question of whether the market participant doctrine continues to protect a city's right to freely negotiate in the marketplace. In doing so, the Court should, as a matter of law and policy, reaffirm and clarify the doctrine by holding that it applies to this case.

A. This Case Illustrates The Necessity Of Effectuating The Policy Considerations Underlying The Market Participant Doctrine

Throughout this century, this Court has recognized that, although the constitution constrains government action taken in the role of sovereign or regulator, the constitution does not restrict the government in its role as proprietor. *See Heim v. McCall,* 239 U.S. 175 (1915) and *Atkin v. Kansas*, 191 U.S. 207, 222-224 (1903) (when exercising a proprietary power, a state "is subject to no more limitation than a private individual or corporation would be in transacting the same business.") In the context of cases involving the Commerce Clause, recognition of this distinction in the form of the market participant doctrine "makes good sense and sound law" for several important reasons. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980). First, the doctrine comports with

the purposes of the Commerce Clause and with judicial precedent. *Id.* at 437. Second, it serves to effectuate basic public policy in three crucial ways: (1) it protects state sovereignty; (2) it ensures that state and local governments enter into the marketplace on an equal footing with other participants; and (3) it allows adjustments within the marketplace between the rights of governmental entities and the rights of private businesses to be made by Congress, rather than by the courts. *Id.* at 437-438. The Ninth Circuit's ruling that Santa Monica is not a market participant should be overturned because it frustrates each of these important purposes.

In *Reeves*, the Court explained that the market participant doctrine protects state sovereignty by restricting *ad hoc* inquiry into the burdening of interstate commerce which " 'would unduly interfere with state proprietary functions if not bring them to a standstill.' " 447 U.S. at 438, n.10, *quoting American Yearbook Co. v. Askew*, 339 F.Supp. 719, 725. The Court also acknowledged that the states have a sovereign interest in retaining freedom to control their own business dealings by deciding with whom to deal and on what terms. *Id.*

This case demonstrates the necessity of maintaining the market participant doctrine in order to preserve the sovereignty of cities and states. Petitioner contends, in effect, that a city may not refuse to deal with a private company engaged in interstate commerce and, indeed, must surrender its property to that company for a nominal fee. The Court of Appeals implicitly accepted these contentions by stating that a city may not burden interstate commerce "in deciding *whether*, or on what terms, to grant a franchise. . . ." App. A-11 (emphasis

added). Thus, the Court of Appeals' decision raises questions of federalism. This Court should resolve those questions by affirming the district court's holding that the market participant doctrine applies.

This case also illustrates the dangers of denying cities an equal footing in the marketplace. *See Reeves*, 447 U.S. at 438 (explaining that states should share the same freedom from federal constraints that is enjoyed by private traders in the marketplace). As explained above in section II. C., petitioner attempts to use the Commerce Clause to shield itself from changing market conditions at the expense of cities and other public landholders. If cities are not ensured an equal footing in the marketplace and the ability to strike bargains based upon present economic conditions, they will be compelled to choose between two unacceptable alternatives: withdrawing from the marketplace or bargaining at a disadvantage. If they choose the latter alternative, cities will risk being placed in the position of subsidizing interstate companies.

This prospect is particularly ominous for California cities because "tax reform" legislation, adopted by initiative measure, has greatly restricted the power of California cities to raise revenues by taxation. *See* Calif. Constitution, Art. 13A. As a result, it is now more important than ever that this Court preserve the market participant doctrine and thereby ensure cities' ability to participate effectively in the marketplace.

In addition to preserving state sovereignty and ensuring that the government has an equal footing in the marketplace, the market participant doctrine also promotes the proper distribution of power between the courts and the legislature:

> "[T]he competing considerations in cases involving state proprietary action often will be subtle, complex and politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors . . . as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court." *Reeves,* 447 U.S. at 439.

The Court of Appeals acknowledged that this is a difficult case. App. A-8. In his concurring opinion, Justice Wiggins characterized it as having political overtones. App. A-32. The issues of law are complex, and the competing policy concerns are difficult to balance. Thus, this is exactly the type of case to which the market participant doctrine should be applied.

B. The Facts Of This Case Do Not Warrant The Creation Of A New Exception To The Market Participant Doctrine Because This Case Involves A Land Lease, Not A Recognized Transportation Corridor

Out of concern that the corridors of transportation be kept open, the Ninth Circuit effectively created a new exception to the market participant doctrine for property held in a city's "sovereign capacity":

> "[T]his case involves lands held in a sovereign capacity that are recognized transportation corridors for commerce. . . . We would find it untenable if a state or its subdivision could allocate rights to the use of publicly held transportation corridors in a manner that discriminated against interstate commerce in favor of intrastate commerce. . . .

> We therefore conclude that, following *Cory*, Santa Monica is not a market participant in the setting of franchise fees for easements under public streets." App. p.10.

However, the facts of this case do not warrant such an erosion of the protections afforded to cities and states by the market participant doctrine.

Notwithstanding the Ninth Circuit's concerns, this case involves no threat to the free flow of transportation. Santa Monica has not attempted to restrict petitioner's right to move its crude oil through that city by tanker trucks using the city streets. The land beneath Santa Monica's streets does not constitute a recognized transportation corridor to which petitioner, or any other person or entity, has a right of access. Indeed, if the land beneath the streets were, in fact, a recognized transportation corridor, it could not be leased to petitioner for its exclusive use. *See* McQuillan, *supra*, at Vol. 10 at p. 685.[5]

C. The Court Should Clarify The Ambit Of The Market Participant Doctrine By Holding That Its Application Depends Upon The Purpose And Effect Of The Challenged Governmental Action And Not Upon Mechanistic Formulas Such As The Manner By Which The Government Holds Title To Land.

The precise contours of the market participant doctrine have not yet been defined. *South-Central*

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[5] Petitioner's amici cite McQuillan, at p. 12 of their brief for the proposition that Santa Monica may not profit by leasing land beneath the streets to Shell. That citation does not provide authority for amici's argument because McQuillan discusses use of the streets themselves, not of subsurface land.

Timber Dev. v. Wunnicke, 467 U.S. 82, 93 (1984); *see* Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause", 84 Mich. L. Rev. 1091 (1986) (noting that the Court has not yet adopted a consistent theoretical position on what constitutes market participation and suggesting that the appropriate test is the government's purpose). This case provides the Court an opportunity to clarify the ambit of the doctrine.

The Ninth Circuit based its ruling that Santa Monica was not a market participant upon a mechanistic distinction between land held in the government's sovereign capacity and land acquired through the marketplace. This distinction does not comport with the approach established by this Court which makes the applicability of the doctrine depend upon the nature of the challenged conduct. *See Reeves*, 447 U.S. at 436, n.7 (explaining that the sole inquiry in determining the applicability of the market participant doctrine is whether the challenged conduct constitutes state participation in the market) and *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-339, n.6 (1982) (explaining that market participant status depends on whether a state is regulating use and not on the manner of ownership of its property).

This established method for determining the applicability of the doctrine affords flexibility and the opportunity to reconcile conflicting interests. *See* Wills and Hellerstein, "The Governmental-Proprietary Distinction in Constitutional Law", 66 Virginia L. Rev. 1073, 1080 (1980). The Ninth Circuit's newly-created test will, in effect, prohibit the courts from evaluating competing interests and will thereby subordinate considerations of policy to convenience. Therefore, this

Court should reverse the Ninth Circuit on the market participant issue and should reaffirm that the application of the market participant doctrine depends upon the purpose and effect of the challenged conduct and not upon mechanistic formulas or labels. *See* Regan, *supra*.

IV

CONCLUSION

The Ninth Circuit's decision accords with precedent established by this Court; petitioner's radical interpretation of the dormant Commerce Clause does not. The detrimental impact which petitioner's reinterpretation of the constitution would have upon cities is real; the spectre of a drastic increase in the costs of transporting crude oil resulting from the Ninth Circuit's decision is not. Accordingly, amici respectfully urge this Court to deny the petition. In the alternative, if the petition is granted, amici request that the cross-petition also be granted so that the Court can clarify the ambit of the market participant doctrine and reaffirm that it continues to protect cities' sovereignty and ability to participate effectively in the marketplace.

Respectfully submitted,

STANLEY E. REMELMEYER
City Attorney of Torrance

JOHN R. CALHOUN
City Attorney of Long Beach

GLENN R. WATSON
City Attorney of Carson

RICHARDS, WATSON & GERSHON
MARSHA JONES MOUTRIE

Attorneys for Amici
TORRANCE, LONG BEACH and CARSON

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 10, 1988, I served the within *Amicus Curiae Brief in Support of Respondent* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Barbara C. Hickl
Shell Oil Company
One Shell Plaza
Post Office Box 2463
Houston, Texas 77052
(three copies)

Karl M. Manheim
Loyola Law School
1441 W. Olympic Boulevard
Los Angeles, California 90015
(three copies)

Edward S. Renwick
David C. Karp
Hanna & Morton
Seventeenth Floor
600 Wilshire Boulevard
Los Angeles, California 90017
(three copies)

Robert M. Myers
City Attorney
Joseph P. Lawrence
Assistant City Attorney
Mary H. Strobel
Deputy City Attorney
City of Santa Monica
1685 Main Street
Room 310
Santa Monica, California 90401
(three copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 10, 1988, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)